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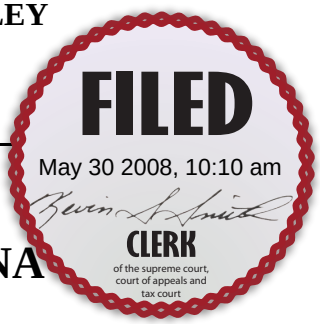

IN THE COURT OF APPEALS OF INDIANA

IN RE: THE MARRIAGE OF	)	
	)	
CHRISTOPHER HARRISON,	)	
	)	
Appellant-Respondent,	)	
	)	
vs.	)	No. 16A04-0709-CV-536
	)	
SHEENA HARRISON,	)	
	)	
Appellee-Petitioner.	)	
	)	

APPEAL FROM THE DECATUR CIRCUIT COURT
The Honorable John A. Westhafer, Judge
Cause No. 16C01-0701-DR-5

May 30, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Christopher Harrison ("Father") appeals a trial court judgment awarding primary physical custody of his son, Z.H., to Sheena Harrison ("Mother").[1] We affirm.

Issues

Father raises the following issues on appeal:

I. Whether the trial court's judgment is clearly erroneous; and

II. Whether the trial court abused its discretion by not entering a provisional child support order.

Facts and Procedural History

Mother and Father were married on March 9, 2001. Z.H. was born of the marriage in 2001. The family resided in Utah until Z.H. was sixteen months old and then moved to Greensburg, Indiana, where they resided until the couple's separation on January 2, 2007. During this time, Mother was the primary caregiver for Z.H. during the day, and Father cared for Z.H. two to three evenings per week while Mother worked.

At 11:00 p.m. on January 2, 2007, Mother returned home from work to find Father and Z.H. gone. She made numerous attempts to call Father and, when she reached him, he informed her that he and Z.H. were near Chicago, were on their way to Utah, and were not coming back to Indiana. Father refused Mother's pleas to return and told her that she could either move to Utah to be with him and Z.H. or stay in Indiana alone.

[1] After filing the appellant's brief on Father's behalf, attorney Deborah M. Agard withdrew her appearance. Father proceeds in this appeal pro se.

On January 3, 2007, Mother filed a petition for dissolution of marriage and a motion for emergency provisional orders, specifically requesting that she be granted temporary custody of Z.H. On February 8, 2007, pursuant to Father's request, the trial court ordered that Mother submit to a mental health examination. The trial court conducted a provisional hearing on March 29, 2007, and took the matter under advisement pending its receipt of the psychologist's report regarding Mother's mental health. On April 4, 2007, the psychologist, Dr. Steven House, submitted his report to the trial court,[2] and on May 16, 2007, the trial court issued a provisional order wherein it found that Z.H. had been in Father's custody for approximately four months and that Mother had been unable to visit him during that time. The trial court awarded Mother temporary physical custody of Z.H. pending a final custody determination. On May 24, 2007, Mother went to Utah and retrieved Z.H.

The trial court conducted a final hearing on July 11, 2007. On August 2, 2007, the trial court issued findings of fact, conclusions thereon, and a decree of dissolution, wherein it awarded the parties joint legal custody of Z.H. and awarded Mother primary physical custody. This appeal ensued. Additional facts will be provided as necessary.

Discussion and Decision

I. Custody Award

Father challenges the trial court's order awarding Mother primary physical custody of Z.H. Indiana Code Section 31-17-2-8 governs custody determinations and provides that the

[2] Father refers extensively to the psychologist's report in his appellant's brief. Mother has filed a motion to strike the report along with any references thereto, as the report was never admitted into evidence. We grant Mother's motion in an order issued simultaneously with this decision.

trial court shall "enter a custody order in accordance with the best interests of the child." The statute lists factors to be considered in determining what constitutes the best interests of a particular child, including:

> (1) The age and sex of the child.
> (2) The wishes of the child's parent or parents.
> (3) The wishes of the child, with more consideration given to the child's wishes if the child is at least fourteen (14) years of age.
> (4) The interaction and interrelationship of the child with:
> (A) the child's parent or parents;
> (B) the child's sibling; and
> (C) any other person who may significantly affect the child's best interests.
> (5) The child's adjustment to the child's:
> (A) home;
> (B) school; and
> (C) community.
> (6) The mental and physical health of all individuals involved.
> (7) Evidence of a pattern of domestic or family violence by either parent.
> (8) Evidence that the child has been cared for by a de facto custodian, and if the evidence is sufficient, the court shall consider the factors described in section 8.5(b) of this chapter.

Id. However, the list is not exhaustive. "The court must consider factors that are relevant, including but not limited to those explicitly listed in the statute." *Russell v Russell*, 682 N.E.2d 513, 515 (Ind. 1997).

At Father's request, the trial court issued findings of fact and conclusions thereon. "When the trial court has entered findings of fact and conclusions of law pursuant to Indiana Trial Rule 52, we apply a two-tiered standard of review: whether the evidence supports the findings and whether the findings support the judgment." *Tompa v. Tompa*, 867 N.E.2d 158 163 (Ind. Ct. App. 2007). "In the event the trial court mischaracterizes findings as conclusions or vice versa, we look past these labels to the substance of the judgment."

Fraley v. Minger, 829 N.E.2d 476, 482 (Ind. 2005). We set aside the trial court's findings and conclusions only if they are clearly erroneous. *Tompa*, 867 N.E.2d at 163. Clear error occurs "when a review of the record leaves us with a firm conviction that a mistake has been made." *Id*. We neither reweigh evidence nor judge witness credibility; rather, we consider only the evidence most favorable to the judgment. *Id*. We give deference to the trial court "who saw the witnesses, observed their demeanor, and scrutinized their testimony as it came from the witness stand." *Kirk v. Kirk*, 770 N.E.2d 304, 307 (Ind. 2002).

Father concedes that the evidence supports the findings. However, he specifically asserts that the findings are insufficient to support the judgment awarding primary physical custody to Mother.[3] We disagree. The trial court's findings provide in pertinent part:

> 3. That the parties were married on March 9, 2001.
> ….
> 4. That the parties … resided in Utah until 2003, when they moved to Greensburg, Indiana.
> ….
> 7. There was one (1) child born of this marriage, namely [Z.H.] DOB XX/XX/2001,
> ….
> 27. That by his testimony, immediately prior to the filing of Mother's Petition for Dissolution of Marriage, Father located with the minor child back to Utah where his family resided.
> 28. That the minor child was in Father's care and custody from January 2nd, 2007, through the preliminary hearing, and was in Father's custody in Utah until May 24, 2007.
> 29. That the minor child was in Mother's care and custody from May 24, 2007, and continues to be in Mother's care and custody at present.
> ….

[3] With regard to the trial court's findings of fact, we note that some are mere recitations of testimony and therefore, as phrased, are not properly considered findings of fact. *Perez v. U.S. Steel Corp.*, 426 N.E.2d 29, 33 (Ind. 1981). However, inclusion of these recitations is not considered harmful error but rather as "mere surplusage." *Id*.

31. That Mother participated in [a] mental health evaluation with Dr. Steven House, on March 9, 2007, pursuant to Court Order.
32. That a preliminary hearing was held on March 15, 2007, both parties present in person and by counsel, witnesses sworn and evidence presented. This Court took all matters under advisement, pending the outcome of Dr. House's mental health evaluation.
….
35. That as a result of Dr. House's report that Mother was not a threat to her child, on May 16, 2007, this Court [o]rdered custody to be switched from Father to Mother, pending final hearing in this matter.
36. That custody of the minor child was transferred from Father to Mother in Utah, without incident, on May 24, 2007.
….
48. The Court finds that the discipline that is employed by Father and Mother is appropriate.
….
51. Both parents wish to have custody, and [Z.H.] loves and is bonded with both parents.
52. The majority of the child's extended family reside either in Greensburg or in Utah near Father's residence; as such, both parents have a strong support group and extended family where they reside.
53. The parties do have some parenting differences and issues (e.g., supervision, health care as it relates to ADHD and weight), but generally, the parents have similar goals for their child, and they agree generally as to education, religion, health, and other matters for the child. Both parents are in a position to make positive decisions for their son.

Appellant's App. at 6-7, 9-12.

The trial court's conclusions provide in pertinent part:

1. The Court, when determining custody, must consider factors that are relevant, including, but not limited to, those explicitly listed in [the] custody statute. Russell v. Russell, 682 N.E.2d 513 (Ind. App. 1997).
2. As such, this Court has the discretion to weigh the evidence presented, and determine what custody arrangement would be in the minor child's best interests.
3. That due to the distance between Father's residence in Utah and Mother's residence in Indiana, that joint physical custody is not an option, and that whichever parent is not awarded primary physical custody of the minor child should have parenting time, at a minimum, pursuant to the IPTGs, Section III, "Parenting Time When Distance is a Major Factor," which equals approximately 60 overnights annually for child support calculation purposes.

> 4. The Court concludes that the parties should continue to have joint custody of their son, with [M]other having primary physical custody.

Id. at 13. The trial court then ordered that

> 2. The parties shall share joint legal custody of the minor child [Z.H.], DOB XX/XX/01, and it is in the child's best interests to be in Mother's primary physical custody in Indiana during the school year, and for Father to have parenting time pursuant to the Indiana Parenting Time Guidelines, Section III, "Parenting Time When Distance is a Major Factor."
> ….
> 4. Holiday parenting time will be pursuant to the Indiana Parenting Time Guidelines unless the parties agree otherwise, or, as specifically modified herein.
> 5. It is in [Z.H.'s] best interests to spend the majority of the school breaks with Father, and with his extended family, in Utah or wherever they may travel.

Id. at 14.

Father contends that Mother's mental health issues render her a less suitable custodial parent than he. However, the record demonstrates that the court carefully considered this factor in making its custody determination. Father merely asks that we reweigh this factor in his favor, which we may not do. Father also argues that awarding custody to Mother disrupted the status quo. However, it was Father and not Mother who disrupted the status quo when he abruptly removed Z.H. from the Indiana home in which he had resided for most of his young life. As the trial court's order indicates that it gave proper consideration to the statutory factors when determining the custody arrangement that was in Z.H.'s best interests, we conclude that the court acted within its discretion in awarding primary physical custody to Mother.

II. Provisional Child Support Order

Father also asserts that the trial court abused its discretion in not entering a provisional child support order. Specifically, he argues that Mother should have been required to pay support during the time in which he had Z.H. in his physical custody. Indiana Code Section 31-15-4-8(a) provides in pertinent part, "The court *may* issue an order for temporary maintenance or support in such amounts and on such terms that are just and proper." (Emphasis added.) The statute does not require the trial court to order temporary support; rather, the trial court has discretion to determine how to treat temporary maintenance. *Rodgers v. Rodgers*, 503 N.E.2d 1255, 1258 (Ind. Ct. App. 1987), *trans. denied*.

In his written request for preliminary relief, Father asked for the following regarding support:

> 3. Child Support—[Mother] to pay child support to [Father] for child support for the minor child, beginning 3/30/07, based upon the evidence. However, due to the distance involved, [Father] *agrees to deviate for [Mother] to be able to travel* for parenting time, and agrees to assist with the reasonable costs of same.

Appellant's App. at 53 (emphasis added). At the hearing, Father testified as follows:

> [Father's Counsel]: Okay. So in addition to *agreeing to possibly waive child support* and apply that to travel expenses, you're also willing to, to help her out with travel expenses?
>
> [Father]: Yes.

Tr. at 37 (emphasis added).

It was within the trial court's discretion to determine whether a provisional support award would be just and proper. We first note that Father's testimony and request for support were ambiguous and indicated a willingness to forego support so that Mother would

have adequate funds to travel to Utah. Moreover, the record indicates that Father and Z.H. lived with Father's parents when they returned to Utah and therefore did not have expenses related to securing and maintaining a residence. In contrast, at the time Father removed Z.H. from the home, he and Mother had numerous delinquent bills that were left to Mother to pay. Finally, we reiterate that Father was the one who created what he now claims to be a financially inequitable situation when he abruptly removed Z.H. from his Indiana home. We conclude that the trial court acted within its discretion in not ordering provisional child support.

Affirmed.

BARNES, J., and BRADFORD, J., concur.